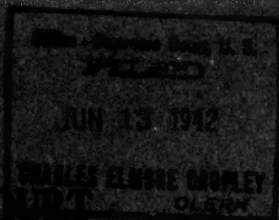


No. 146

(4)



IN THE SUPREME COURT
OF THE UNITED STATES

October Term, 1941

R. E. CRUMMER & COMPANY,

Petitioner,

vs.

E. H. WARE, ET AL., and

BARNETT BANK OF AVON PARK, ET AL.,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED
STATES CIRCUIT COURT OF APPEALS FOR
THE FIFTH CIRCUIT, AND BRIEF IN
SUPPORT THEREOF.

Respectfully Submitted,

JOHN F. LANE, JR.

Counsel for Petitioner

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TO THE HONORABLES, THE CHIEF JUSTICE AND
THE ASSOCIATE JUSTICES OF THE SUPREME
COURT OF THE UNITED STATES:

May it please the Court, the Petitioner, R. E. Crummer
& Company, respectfully shows unto this Court:

STATEMENT OF THE CASE

This is the second appearance of this case before the Court. In the first case, *American United Mutual Life Insurance Company vs. City of Avon Park*, 311 U. S. 140, 85 L. Ed. 93, an interlocutory decree confirming a Plan of Com-

position of the City of Avon Park, filed under the provisions of the Municipal Bankruptcy Act (11 U. S. C. A. 401-403) was reversed, and the cause remanded to the District Court for further proceedings. During the pendency of the proceedings in bankruptcy, and as a part of the Plan of Composition under which the Refunding Bonds were to be issued as extensions, mergers and renewals of the old indebtedness (R. 185), the City of Avon Park, pursuant to authority of the City Charter¹ and pursuant to orders of the Bankruptcy Court, made special levies for a sinking fund for the payment of the indebtedness, the evidence of which was to be transmuted by the Plan of Composition into new Refunding Bonds. The City Charter specifically prohibited these debt service funds from ever being diverted to any other purpose.¹ Part of the

¹ The Charter provision is as follows:

Chapter 12514. Laws of Florida, Special Acts, 1927.

Sec. 29. The City Council shall have power by ordinance to levy and collect taxes upon all property, real, personal and mixed within the corporate limits of said City, for municipal purposes. For ordinary purposes the rate shall not exceed twenty-five (25) mills on the dollar; a special tax in addition thereto may be levied sufficient to create a sinking fund for the purpose of paying off the city's bonded indebtedness and interest thereon; a special tax may be levied and collected not to exceed two (2) mills on the dollar for the support, maintenance or employment of a municipal band. A special tax may be levied and collected not to exceed two (2) mills on the dollar for publicity purposes. All of said special taxes herein enumerated to be in addition to the levy made for general municipal purposes, and the moneys arising from said levy shall not be diverted or used for any other purpose than that for which same is made. All levies shall be made from the approved permanent assessment roll prepared by the City Tax Assessor. All persons, corporations, or firms holding property, whether real or personal, shall be subject to taxation, by the City of Avon Park, and are hereby required to make a return of same for such purposes on a blank to be furnished by the City of Avon Park on or before the first day of February in each year. Such returns shall contain a complete list of all property, both real and personal, located in the City of Avon Park and subject to taxation by said City belonging to such person, firm or corporation, on the first day of January in the years for which return is made, giving separately and intelligently a description of each separate lot and parcel of real estate.

funds from these special levies (the sum of \$37,766.33) was deposited from time to time with the Respondent, Barnett Bank of Avon Park in a "sinking fund" account. After the decision of this Court, the Respondents, Ware, et al., City Commissioners of Avon Park, consulted two attorneys (R. 90) as to the disposition of the debt service funds then on hand. Both attorneys advised the Respondents against using such funds in the construction of a then contemplated airport. On January 14, 1941, a check was presented to the Respondent, Barnett Bank of Avon Park, which was drawn on the "sinking fund" account, payable to the order of that bank. For this check, and simultaneous therewith, the Respondent Bank gave a draft for this total sum drawn on a Jacksonville, Florida bank. At the time of the withdrawal of these funds, the bank had been advised that the City intended to use the funds on an airport, and also knew, through hearsay, that the City was proceeding under the provisions of the Municipal Bankruptcy Act (R. 142). These funds, together with other funds, were spent on the construction of an airport in the City of Avon Park.

In March, 1941, the District Judge called all parties to the bankruptcy proceeding before it to determine the future progress of the case (R. 1), and also to determine the amount of debt service funds collected during the bankruptcy proceedings then on hand. It was then made to appear that Ware, et al., the City Commissioners, had taken this money levied under the court order (the \$36,270.40 of the debt service funds which were on deposit with the Barnett Bank), and an additional sum of \$29,447.80 (total \$65,715.20) and had spent it in the construction of the airport in the City. There was in addition a diversion during the pendency of the bankruptcy proceeding of approximately \$11,000. by the

previous City Commissioners (who are not involved in these proceedings). Thereupon, the District Judge issued an order against Ware, et al. (R. 104-110), the City Commissioners, together with the Respondent, Barnett Bank of Avon Park, to show cause why they should not be compelled to replace and account to the debt service account of the City the amount of such funds diverted by them. There were other persons named in the order who are not involved in this proceeding. The Court, in its order to show cause, stated that the diversion

“was probably the result of a conspiracy between certain officials of the City of Avon Park, the contractor, the surety on the contractor’s bond, and the banks in which the moneys involved were originally deposited, and to which the same were transferred, or their respective officials.” (R. 105.)

The order further stated that the moneys diverted were

“assets and resources of the bankrupt municipality which had come within the jurisdiction of this Court, and which were in *custodia legis*, and that this Court has power and authority and is under a duty to require the replacement of such funds.” (R. 105.)

The Respondents, Ware, et al., City Commissioners of Avon Park, answered the rule to show cause, admitted the diversion of the funds, but denied that the Court had any jurisdiction over them, denying that the funds were in *custodia legis* (R. 110). The Respondent, Barnett Bank, answered the rule to show cause (R. 118-122), denied that the funds were in *custodia legis*, denied that it conspired with the City Commissioners to divert the funds, claimed that it had paid the funds back to its depositor, and therefore was not accountable for any subsequent diversion by its officials.

Testimony was taken, and the case was heard on its merits. After a full hearing and the taking of testimony, the District Judge rendered an opinion, in which he determined that (R. 225-230)

" * * such fund was under the control of the Court and raised pursuant to an order of the Court, and it appears to me that the City officials were in the same position as the officials of a corporation in organization proceedings under 77-B who were permitted to carry on the business of the corporation, and undoubtedly could be held responsible for the diversion of funds without the authority of the Court."*

and that

"it is contended by these respondents that they can only be held responsible in a plenary suit. It has always been held that the Court by summary proceedings can require officers and others who dissipate a fund in custodia legis to reimburse such fund, and I can see no valid reason why such rule should not be applied to the facts in this case. The fund was under the control of the Court, and the cause was still pending in this Court, and these officials deliberately and wilfully against the advice of counsel diverted the fund, and they must be held responsible therefor."

The Judge further found that the Respondent, Barnett Bank, having paid the debt service fund on deposit back to its depositor, should not be held accountable for its subsequent diversion. Then on the basis of such finding by the District Judge, an order was issued (R. 230-231) dismissing the Respondent bank, but requiring the Respondents, Ware, et al., to pay into the sinking fund account of the City of Avon Park the sum of \$65,715.20. From this order, the Respondents, Ware, et al. (styling themselves "individually and as com-

misioners of the debtor corporation") (R. 231) appealed to the United States Circuit Court of Appeals.

The Petitioner, R. E. Crummer & Company, a creditor of the City, and a representative of other creditors, also appealed from that part of the order releasing the Respondent, Barnett Bank, from replacing the debt service funds withdrawn from it, claiming that if the funds were in *custodia legis* that the bank knew of the bankruptcy proceeding, and knew of the intended diversion at the time of their withdrawal, and therefore it should be made to account for them.

The Circuit Court of Appeals for the Fifth Circuit reversed the District Judge, determined that the debt service funds were not in *custodia legis* during the pendency of the bankruptcy proceeding, that the order sought to compel the officials to account for the management of the fiscal affairs of the City, and that the Court had no jurisdiction by summary proceedings to compel the Respondents, Ware, et al., or the Bank, to account for the funds. It is from this decision of the Circuit Court of Appeals that the writ of certiorari is now being presented.

QUESTIONS PRESENTED

1. Does a Court of Bankruptcy, proceeding under the provisions of the Municipal Bankruptcy Act (11 U. S. C. A. 401-403) have jurisdiction over funds levied and collected, pursuant to an order of the Bankruptcy Court, by a petitioning municipal corporation (solely for the purpose of paying the bonded indebtedness of the City affected by the Plan) so that it can compel, by summary proceeding, the replacement of such funds if they have been illegally diverted by the City officials of the petitioning City?

2. Are debt service funds, levied and collected by a municipality proceeding under the provisions of the Municipal Bankruptcy Act (11 U. S. C. A. 401-403), pursuant to an order of the Bankruptcy Court and on deposit in a bank during the pendency of the proceedings, in *custodia legis*?

3. Where, in a proceeding under Chapter IX of the Bankruptcy Act, debt service funds are collected under a court order to pay the bonded indebtedness of the City affected by a Plan of Composition, and the interlocutory decree confirming such Plan has been disapproved by the Supreme Court of the United States, but while the bankruptcy proceedings are still pending, the officials of the City withdraw such funds from a bank with knowledge on the part of the bank of the intended use of the funds, does the Bankruptcy Court have jurisdiction of such funds to determine whether such diversion was illegal, and if such diversion was illegal, does it have jurisdiction to compel the City officials and the bank to replace such funds by a summary order?

4. Where it appears that during a proceeding under the provisions of the Municipal Bankruptcy Act (11 U. S. C. A. 401-403) funds levied and collected pursuant to a court order have been diverted to purposes other than those for which they were levied, must creditors of the City resort to a plenary suit against a bank and the City Officials to compel a repayment of such funds if such funds were illegally diverted to purposes other than those for which they were levied?

REASONS FOR GRANTING CERTIORARI

1. The Circuit Court of Appeals for the Fifth Circuit has decided an important question involving the jurisdiction and powers of a bankruptcy court proceeding under the Muni-

pal Bankruptcy Act (11 U. S. C. A. 401-403) which has not been, but should be, settled by a decision of this Court.

2. The decision of the Circuit Court of Appeals for the Fifth Circuit has decided a question of federal law in a way probably in conflict with applicable decisions of this Court.

American United Mutual Life Insurance Co. vs. City of Avon Park, 311 U. S. 138, 85 L. Ed. 91,

Gross vs. Irving Trust Company, 289 U. S. 342, 77 L. Ed. 1243,

Chicago, Illinois National Bank & Trust Co. vs. C. R. I. & P. R. R. Co., 294 U. S. 648, 79 L. Ed. 1110,

Sampsell vs. Imperial Paper & Color Corporation, 313 U. S. 215, 85 L. Ed. 1293,

Isaacs, Trustee in Bankruptcy, vs. Hobbs Tie & Timber Co., 282 U. S. 739, 51 Sup. Ct. 270, 75 L. Ed. 645,

Pepper vs. Litton, 84 L. Ed. 281, 308 U. S. 295,

May vs. Henderson, 268 U. S. 111, 45 S. Ct. 456, 69 L. Ed. 870.

3. The Circuit Court of Appeals has decided an important question of federal law probably in conflict with decisions of other Circuits.

Poinsett Lumber & Manufacturing Company vs. Drainage District No. 7, (1941) 119 F. (2) 270,

Governor Clinton vs. Knott, 120 F. (2) 149, (C. C. A. 2)

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Reifsnyder vs. B. Levy & Son, (C. C. A. 3) 88 F. (2) 287.

4. The Circuit Court of Appeals has decided a question of federal law in a way probably contrary to the law, as announced by the decisions of the State of Florida rendered prior thereto.

Kelley vs. Lassiter, 7 So. (2) 458, (Adv. Sheets).

5. The decision of the Circuit Court of Appeals is probably in conflict with prior decisions of the same Circuit.

Touchton vs. City of Fort Pierce, 109 F. (2) 691.

WHEREFORE, your Petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Honorable Court directed to the Circuit Court of Appeals for the Fifth Circuit, commanding that Court to certify and send to this Court for its review and determination on a day certain to be therein named a full and complete transcript of the record and all proceedings in the case, numbered and entitled on its docket: No. 10195, E. H. Ware, et al., Appellants, vs. R. E. Crummer & Company, et al., Appellees, and R. E. Crummer & Company, Appellant, vs. Barnett Bank of Avon Park, et al., Appellees, and that said judgment of the Circuit Court of Appeals may be reversed by this Honorable Court, and that Petitioner may have such other and further relief as to this Court may seem meet and just.

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